Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THANH VONG HOAI,
Petitioner,

SUN REFINING AND MARKETING COMPANY, INC.,
Respondent.

APPENDIX #1 OF 2 TO
Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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136 pp

TABLE OF CONTENTS
FOR
APPENDICES I AND II

SECTION (i): Orders delivered upon the rendering of the judgment by the U.S. Court of Appeals (DC Cir.) whose decision is sought to be reviewed.

Item	Page
March 09, 1994, JUDGMENT of the United States Court of Appeals for the District of Columbia Circuit	1

SECTION (ii): Other orders and opinions, findings of fact and conclusions of law rendered in the case, reference to which is necessary to ascertain grounds of the judgment in (i), supra.

Item	Page
10-25-91 Order of the USDC (DC), by Oberdorfer, J.	3
09-16-91 Memorandum and Order of the USDC (DC), by Oberdorfer, J.	4
10-1-90 Memorandum of the USDC (DC) by Oberdorfer, J.	7
5-1-91 Memorandum of the USDC (DC) by Oberdorfer, J.	31
6-3-91 Memorandum and Order of the USDC (DC)	63

10-25-91 Memorandum of the USDC(DC) by Oberdorfer, J. 67

9-16-91 Memorandum and Order of the USDC(DC) by Oberdorfer, J. 81

10-1-90 Order of the USDC(DC) by Oberdorfer, J. 85

5-20-91 Notice (Pretrial) of the USDC(DC) by Oberdorfer, J. 88

6-28-91 Supplemental Pretrial Order of the USDC(DC) by Oberdorfer, J. 94

SECTION (iii): Orders on Rehearing

5-25-94 Order of USCA(DC Cir) by Edwards, Buckley and Randolph, JJ. 107

5-25-94 Order of USCA(DC Cir) by Mikva, Ch. J; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, JJ. 108

SECTION (iv): No Items

SECTION (v): Other Appended Materials

09-5-87 [HOAI'S] VERIFIED COMPLAINT UNDER THE FEDERAL PETROLEUM MARKETING PRACTICES ACT 15 U.S.C. 2801, ET SEQ. (PMPA) FOR DAMAGES AND FEES AND FOR DECLARATORY RELIEF 109

03-27-86 [HOAI'S] DEALER FRANCHISE AMBIGUOUSLY LABELED "DEALER TRIAL FRANCHISE"--Significant Sections Only 132

09-21-81 EXCERPT FROM PREVIOUS HOAI DEALERSHIP WITH SUN OIL (Establishing 155

that Hoai could not be a "trial" dealer under provisions of the PMPA)

7-11-91 DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF EXEMPLARY DAMAGES 157

7-26-91 DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE LIMITATION OF DAMAGES FROM SEPTEMBER 8, 11986 TO APRIL 27,1987 159

12-21-90 Extracts from Defendant's MOTION IN LIMINE FOR EVIDENTIARY RULINGS 161

08-5-91 PLAINTIFF'S OPPOSITION TO SUMMARY JUDGMENT ON EXEMPLARY DAMAGES [extracts] 163

01-11-91 PLAINTIFF'S OPPOSITION TO DEFENDANT'S SECOND MOTION IN LIMINE (for Evidentiary Rulings)[extracts] 165

11-29-90 OPPOSITION OF THE PLAINTIFF TO DEFENDANT'S MOTION TO LIMIT THE DAMAGES WITHOUT AUTHORITY TO DO SO [extracts] 169

10-11-91 PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON EXEMPLARY DAMAGES IN THE AMOUNT OF $650,000.00 171

03-02-87 Sun Oil letter to Hoai sent to Station from which Sun knew Hoai was absent six months <u>after</u> Sun Oil had terminated the franchise they now terminate "legally" a second time 173

06-18-87 Internal memo of Sun Oil establishing that the remainder pay- 176

ment of $10,300.03 after the second termination was paid to extortionist Vo, and not to Hoai, whom Sun pretended was the "real" dealer, albeit not allowed to exercise any of his dealer's rights

01-22-87 Sun Oil letter to Hoai sent to the station given to Vo by Sun Oil's consent agreement of 09-08-86, thus terminating Hoai, threatening to terminate Hoai a second time and pretending that Hoai had a "trial" franchise 178

12-3-86 Sun Oil letter to Hoai three months after his illegal termination by Sun's "consent agreement" with Vo, which threatens to terminate his again. 181

03-02-87 Sun Oil writes to Hoai (whom Sun terminated by its consent agreement) complaining about the poor performance of their illegal "dealer" Vo, to whom they gave the station when Sun terminated Hoai. 186

08-26-81 Excerpts from a previous Hoai dealership with Sun Oil at Greenbelt, MD, establishing that under the Act, as a previous dealer, he could not be regarded as having a "trial" franchise. 189

11-15-90 SUN OIL'S MOTION IN LIMINE FOR DETERMINATION OF DAMAGES 190

08-25-86 NOTICE TO SURRENDER PREMISES TO: THANH VAN VO, FROM HOAI, ENDORSED BY SUN OIL WHICH CONFIRMED HOAI WAS THEIR DEALER AND NOT VO 192

6-25-91 Deposition of David Roseman, 195

Vo's attorney,who confirms is several ways that neither Sun Oil nor Vo gave any consideration to the PMPA, the DC Retail Service Station Act, or Hoai, as Sun's dealer, who had special rights under the PMPA

09-08-86 CONSENT ORDER FOR EXTENSION OF TEMPORARY RESTRAINING ORDER AS TO DEFENDANT SUN REFINING AND MARKETING COMPANY, signed by Vo's attorney, Roseman and Sun Oil's attorney, Forrester 207

DISTRICT OF COLUMBIA CODE, SECTION 10-225 et seq. "Retail Service Stations" 214

UNITED STATES CODE, Chapter 55, SECTION 2801 et seq. "Petroleum Marketing Practices Act" 222

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7133, et al. September Term, 1993
87cv02456

THANH VONG HOAI,
Appellant,

v.

FILED: MAR 09 1994
Ron Garvin, Clerk

Sun Refining and
Marketing Company, Inc.,
Appellee

On Appeal From the United States District Court for the District of Columbia Circuit

Before: Edwards, Buckley and Randolph, Circuit Judges.

J U D G M E N T

This cause came to be heard on appeal from the judgments of the District Court, and was briefed and argued by counsel. The issues have been accorded full consideration by the Court and occasion no need for a published opinion. See D.C. Cir. Rule 36(b). It is

ORDERED and ADJUDGED, by the Court, that the orders and accompanying memoranda of the District Court dated October 1,

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND MARKETING COMPANY,	)	
	)	
Defendant.	)	

ORDER

For the reasons stated in the accompanying Memorandum, it is this 25th day of October, 1991, hereby

ORDERED: that defendant's motion for summary judgment on the issue of exemplary damages should be and is hereby GRANTED; and it is further

ORDERED: that plaintiff's claim for exemplary damages is dismissed.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

notice recognized that the disappointing results were largely due to distractions caused by the dispute between plaintiff and Vo. [1] The notice also cited plaintiff's failure to comply with defendant's record keeping and inventory control program.

Plaintiff has not disputed these facts or proffered any [-2-] evidence of material facts which would justify a conclusion that the franchise survived the January 20 notice.

Plaintiff proffers that there was a conversation with defendant about a five-year relationship. Defendant disputes this assertion with sworn testimony. However, even if there were such a conversation, it is determined as a matter of law that the

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[1] Internal memoranda written contemporaneously to the decision to terminate evidence that these reasons stated in the January 20 letter were the genuine reasons for the termination there noticed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND MARKETING COMPANY,	)	
	)	
Defendant.	)	

MEMORANDUM

Plaintiff Thanh Vong Hoai brings this action against Sun Refining and Marketing Company ("Sunoco") under the Petroleum Marketing Practices Act ("the Act"), 15 U.S.C. § 2801 et seq., alleging that Sunoco terminated his Dealer Trial Franchise Agreement in violation of the Act. The matter is presently before the Court on cross-motions for summary judgment. For reasons stated below, defendant's motion will be denied, plaintiff's motion will be granted, and further proceedings will be

Sunoco branded motor fuel.[3] There is pending an unresolved dispute between Hoai and Vo as to which of them was entitled to possession and was in fact in possession from April through August 25, 1986. See Thanh Van Vo. v. Thanh Vong Hoai, No. 7075-86 (D.C. Sup. Ct.). It is Hoai's claim, as described by our Court of Appeals, that he was "threatened with murder and then 'driven out' of his gas station by Vo, with the help of other Vietnamese, a self-styled 'mafia'." Hoai v. Sun Refining and Marketing Co., Inc., 866 F.2d 1515, 1516 (D.C. Cir. 1989) (citation omitted and quotation marks removed). Whatever may be the ultimate resolution of the dispute between Vo and Hoai, it is undisputed that Sunoco supplied motor fuel to whomever was

---

[2] See Franchise Agreement, Part III (lease provisions); id. Part II, para. 5 (use of Sunoco branded fuel oils and Sunoco name).

("TRO"), effective for ten days, requiring Hoai and the Hemenways to discontinue the sale of any petroleum products or transacting any other business at the premises which Sunoco had leased to Hoai and to return possession and occupancy of the premises to Vo.[5] The TRO directed Sunoco to continue supplying Vo its branded petroleum products and to permit Vo to occupy and operate the station "under the same terms and conditions as existed" between him and Sunoco before August 25, 1986.[6]

On September 8, 1986, Sunoco and Vo (without the participation of Hoai) agreed to a Consent Order which recited the

---

[5] See Temporary Restraining Order, Thanh Van Vo v. Sun Refining and Marketing Co., No. 70757-86 (D.C. Sup. Ct. August 29, 1990) ("TRO") appended to Defendant's Statement, Exhibit 15.

[6] See id. at 2.

counsel were conspicuously absent from the mailing list. Thereafter, for several months, Sunoco continued to supply motor fuel to Vo at the Pennsylvania Avenue premises.[9] On January 22, 1987, Sunoco sent a written notice to Hoai at the Pennsylvania Avenue address advising him that "the operation of the station had not met with Sun[oco]'s expectations or standards. There has been a significant drop in the historical volume of gasoline sold" at [-4-] the Pennsylvania Avenue station.[10] Recognizing that this might be "due in large part to the distractions caused by the dispute" with Vo, Sunoco nevertheless advised Hoai that it had "elected to nonrenew [his] franchise

---

[9] See supra note 3.

[10] Letter from Harold J. Vaughn to Than Vong Hoai, January 22, 1987, appended to Defendant's Statement of Material Facts in Issue, Exhibit 14

and lease terminated and Sunoco discontinued supplying motor fuel to Vo or to the Pennsylvania Avenue premises.[14] It is undisputed that after August 29, 1986, when Hoai vacated the premises pursuant to the TRO, he never again occupied the premises which had been leased to him by [-5-] Sunoco or received any Sunoco branded motor fuel pursuant to his franchise agreement with Sunoco.

Meanwhile, on September 18, 1986, counsel for Hoai filed an appeal from the Consent Order to the District of Columbia Court of Appeals. On March 4, 1988, that court dismissed the appeal, and remanded the case to the Superior Court with the observation that the TRO and the Consent Order had expired by their own terms; the Court of Appeals decision did not purport

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[14] See Defendant's Statement at para. 15.

by the Act. [-6-]

A.

The franchise agreement is a general form contract, stating the terms and conditions on which Sunoco agreed to make available branded motor fuel to Hoai as a "Dealer" and under which Hoai as Dealer was required by Sunoco to operate his business. The agreement specifically provides that

> should Dealer fail to substantially comply with, or violate, any requirement imposed upon, or promise made by Dealer in this Dealer Franchise, Company may . . . terminate this Dealer Franchise.

See Franchise Agreement para. 17(d). In the event of termination, the agreement obligates Hoai to cease using Sunoco's branded identification and provides that Sunoco "shall repurchase" from Hoai all Sunoco's branded motor fuels at Hoai's cost. See id. para. 17(e).

As a Dealer named in the contract,

to notify their franchisees of an impending termination as a prerequisite to lawful termination. Generally, a franchisor must provide notice "not less than 90 days prior to the date on which such termination or nonrenewal takes effect." Id. § 2084(a)(2). The Act requires that the statutory notice

> (1) shall be in writing;
>
> (2) shall be posted by certified mail or personally delivered to the franchisee; and
>
> (3) shall contain -
>
> > (A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;
> >
> > (B) the date on which such termination takes effect; and
> >
> > (C) the summary statement [of franchisee rights under the Act prescribed by Energy Department regulations].

Id. § 2804(c). The Act also provides that where it would not be reasonable for a

based upon grounds specified in the Act, nor was it accompanied by the notice required by the Act. Sunoco contends that there was no termination at all. The Consent Order did not terminate the franchise, but rather recognized the continuing legal vitality of the franchise agreement by providing that Sunoco would resume supplying motor fuel to Hoai when and if the Vo-Hoai dispute was resolved by them, and Hoai came into possession of the premises.

A.

Courts have treated three elements as the essential components of the franchise agreement: "[T]he contract to use the refiner's trademark, the contract for the supply of motor fuel, [and] the lease of the premises." May-Som Gulf. Inc. v. Chevron U.S.A.. Inc., 869 F.2d 917, 922 (6th Ctr. 1989); see S. Rep. No. 731, 95th

> may not be circumvented by a termination or non-renewal of the real estate lease or motor fuel supply agreement which thereby renders the trademark license useless.

Senate Report at 29; 1978 U.S. Code Cong. & Adm. News at 888.

In light of these principles, Sunoco plainly terminated Hoai's franchise. Sunoco may have breached its lease to Hoai by permitting Vo to occupy the premises instead of Hoai. It certainly breached its agreement to supply motor fuel by supplying motor fuel to Vo instead of Hoai. Thie breach effectively terminated Hoai's franchise. This termination occurred at the latest on September 8, 1986 when, free from the compulsion of the TRO, Sunoco discontinued sale of motor fuel to Hoai and commenced (or resumed) supplying motor fuel to Vo at the premises leased by Sunoco to Hoai.

Sunoco argues that under the Consent

motor fuel to Hoai at the premises and imposed upon it an obligation to supply Vo there, the TRO expired on September 7, ending those court imposed duties of Sunoco. Sunoco was not compelled to enter into the September 8, 1986 Consent Order. As a consequence, in fact and in law, that consent order was an agreement between Sunoco and Vo. This construction is confirmed by our Court of Appeals' treatment of the Consent Order as an agreement. See Hoai v. Sun Refinina & Marketina Co., Inc., 866 F. 2d at 1519. Moreover, irrespective of whether the approval of the Superior Court Judge endowed the order with any greater authority than a mere agreement, the Consent Order could not have abridged Hoai's rights. Hoai was neither a party to it nor apprised of it before it was agreed upon between Vo and Sunoco and signed by

18, 1978 U.S. Code Cong. & Adm. News at 876. It may, indeed, be that his absence from the premises, through no fault of Sunoco, violated his franchise agreement and would therefore have justified termination of the franchise under 25 U.S.C. § 2802(2)(A), see supra 8, in September, 1986 or before, even though, as Hoai vociferously contends, his absence was coerced by Vo's violence or the threat of it.

However, Sunoco failed to provide Hoai with the notice required by the Act to effect a lawful termination. Nor is the Superior Court's temporary restraining order or the consent order a legally acceptable substitute for the statutory notice procedure. The application for TRO was sought, not by Sunoco, but by Vo, and Sunoco did not furnish Hoai with any notice with respect to the [-13-] Consent Order

franchise agreement with the intent of assigning the franchise to Vo, in violation of the franchise agreement. See Franchise Agreement, Part II para. 20(a)(6).[16] Sunoco does not cite any precedent for such a use of equitable estoppel. Moreover, assuming that such an equitable defense exists, it cannot prevail in the [-14-] face of the specific requirements of the Act. Under the Act, Sunoco had the ability to remedy such a violation of the Franchise Aqreement if it first gave Hoai statutory notice that it intended to terminate Hoai's franchise because of his alleged

---

[16] Section 20 of the Franchise agreement contains various representations of the Dealer. One of them is that

> Dealer has no intention or plan, at the time of signing of this Dealer Franchise, to transfer or assign this Dealer Franchise or Dealer's business.

Franchise Agreement, Part II, para. 20(a)(6).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND	)	
MARKETING CO.	)	
Defendant.	)	

MEMORANDUM

An Order of October 31, 1990 found that defendant Sun Refining & Marketing Company ("Sunoco") had terminated Hoai's Sunoco franchise without the notice required under the Petroleum Marketing Practices Act (the "Act"), 15 U.S.C. § 1801, and accordingly awarded partial summary judgment to Hoai on the question of liability. An Order of February 28, 1991 considered two motions in limine from Sunoco concerning trial on the issue of actual damages. That Order denied the motions in part, granted them in part, and

A.

The Act provides that a franchisee who proves a violation of the Act "shall be entitled --

> (A) consistent with the Federal Rules of Civil Procedure, to actual damages:
>
> (B) in the case of such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and
>
> (C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor."

15 U.S.C. § 2805(d)(1). The Act also provides that "[t]he question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury." Id. § 2805(d)(2). It follows then that only evidence [-2-]

Hoai argues that the term actual damages has an established meaning at common law. In support of this contention, he cites eight cases involving claims of libel, personal injury, and even violation of the Equal Credit Opportunity Act, spanning most of this century, and decided by state supreme and appellate courts from South Carolina to Washington state. See Anderson v. United Finance Co., 666 F.2d 1274, 1277 (9th Cir. 1982); Arizona Copper Co. Burciaga, 20 Ariz. 85, 177 P. 29 (1918); Washer v. Bank of America Nat'l Trust & Savings Ass'n, 123 P.2d 575 (Cal. App. 1942); Winans v. Chapman, 104 Kan. 664, 180 P. 266 (1919); Stephens v. Lever Bros. Co., 155 S.W.2d 540 (Mo. App. 1941); Oliver v. Columbia. N. & L. R. Co., 65 S.C. 1, 43 S.E. 307 [-3-] (1902); Ott v. Press Pub. Co., 40 Wash. 308, 82 P. 403 (1905). These cases note that actual damages are

clear definition for actual damages the nature of damages recoverable under the Act should be drawn from the common law or statutory actions it replaces. This argument is eminently reasonable. The Act was designed to prevent franchisors from exploiting their superior bargaining power by, for example, "suddenly terminating a business for which the franchisee has worked long and hard to develop good will." Brach v. Amoco Oil Co., 677 F.2d 1213, 1220 (7th Cir. 1982) (citing 123 Cong. Rec 10386 (1977) (remarks of [-4-] Rep. Mikva)). Therefore, "[a]s remedial legislation, the Act must be given a liberal construction consistent with its overriding purpose to protect franchisees." Id. at 1221 (citations omitted). It follows that the Act should not be construed in such a way as to restrict the damages available to a franchisee for an improper termination.

2802), by imposing notice and other procedural requirements on authorized terminations (id. 2804), and by providing improperly terminated franchisees with remedies not normally available under state law such as injunctive relief (5 U.S.C. § 2805(b)), exemplary damages, (id. § 2805(d)(1)(B)), and attorney's fees, (id. § 2805(d)(1)(C)). In this sense, the Act acts much like the [-5-] Uniform Commercial Code: It introduces standardized, and in this case required, terms into contracts between franchisors and franchisees.

The Act does not, however, impose any fiduciary duty upon franchisors requiring them to act in the best interests of their franchisees. Instead, it leaves "intact the franchisor's legitimate freedom to choose with whom it will deal," Lewis v. Exxon Corp., 716 F.2d 1398, 1399 (D.C. Cir. 1983), and it largely preserves a

2802(c). The only restriction on the franchisor's pursuit of its own self-interest is that its justification for termination must be authorized by the Act and, in terminating a franchisee, it must follow the procedures described in the Act. As a consequence, [-6-] the relationship between franchisor and franchisor remains primarily a contractual relationship.

Implicitly recognizing the contractual nature of disputes under the Act, the few reported decisions discussing damages have allowed franchisees to recover for lost profits. See Lippo v. Mobil Oil Corp., 776 F.2d 706, 716 - 18 (7th Cir. 1985); Thompson v. Kerr-McGee Refining Corp., 660 F.2d 1380, 1388 (10th Cir. 1981), cert. denied, 455 U.S. 1019 (1982); Midwest Petroleum Co. v. American Petrofing Marketing, Inc., 644 F.Supp. 1067, 1070 (E.D. Mo. 1986). Specifically, these cases

actual damages phase of the litigation he should also recover actual damages in tort. His theory is that the Act "forbids the franchisee who is terminated or nonrenewed from [-7-] bringing an action under any statutes or common law which allowed, prior to its enactment, the franchisee to sue the franchisor in the state court under common law or statutory causes of action." Plaintiff's Motion for Alternation and Amendment of Judgment Pursuant to Rule 59 at 10. He then reasons that his claim under the Act should "subsume . . . and incorporate" all the damage he could have recovered if he had pleaded and proved the allegedly preempted tort claims. Id. at 10. Thus, Hoai seeks the damages he could have recovered had he proven claims for abuse of process, wrongful eviction, intentional infliction of emotional distress, conspiracy to interfere with contract,

termination or non-renewal of petroleum franchises. Rather it [-8-] preempts only state [actions] as to grounds for, procedures for, and notification requirements with respect to termination and non-renewal." Bellmore v. Mobil Oil Corp., 783 F.2d 300, 304 (2d Cir. 1986) (footnote omitted). None of the tort claims enumerated by Hoai have anything to do with the "grounds for, procedures for, and notification requirements with respect to termination and non-renewal." Id. at 304. Nor do they in any way "conflict with Congress's objective of establishing 'a single, uniform set of rules governing the grounds for termination and non-renewal of motor fuel marketing franchises."' Barnes v. Gulf Oil Corp., 795 F.2d 358, 364 (4th Cir. 1986) (quoting Senate Report at 19). As a consequence, the Act's preemption clause does not bar a terminated franchisee

which might be recoverable. In any event, it would be unfair at this late stage in the proceedings to allow Hoai to amend his complaint more than three years after the original filing to include such claims because Sunoco had no notice of the claims for actual damages that Hoai now attempts to bring. See Fed. R. Civ. P. 15(a) (noting that leave of court to amend should be "freely given when justice so requires") (emphasis added).

C.

In sum, because the relationship between franchisor and franchisee is basically contractual and because the Act does not fundamentally change that relationship, it follows that actual damages under the Act should subsume damages available under contract law. By contrast, because the Act does not bar plaintiffs like Hoai from bringing tort

to articulate those theories. As a consequence, it was not possible in the Order of February 28, 1991, nor is it possible now, to rule definitively upon Sunoco's motion in limine. This is neither surprising nor unfortunate: Motions in limine are most naturally brought just before or at trial. See. e.g., Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708, 712 (6th Cir. 1975), cert. denied, 423 U.S. 987 (1975). Nevertheless, if only to clarify the basis of the Order of February 28, 1991 and to help structure discovery, some points can and should be made here.

A.

Hoai indicates at several points that he plans to present evidence concerning the embarrassment, the pain and the emotional suffering that Sunoco's termination of his franchise has caused him. Such injuries are not compensable under the Act.

for the delivery of messages concerning death." Id. § 353, comment a. A franchise contract has none of the personal elements that are involved in these contracts and that make it particularly likely to a reasonable person that a breach will cause serious emotional disturbance. Finally, a reasonable person would not have seen Sunoco's manner of breaching its obligations towards Hoai to be particularly likely to result in serious emotional disturbance. One would not have expected Sunoco's actions to surprise Hoai's expectations: Sunoco merely continued supplying Vo with gasoline under the same terms as the previous temporary restraining order. Moreover, although Hoai may have felt betrayed by Sunoco's actions, a reasonable person would not have foreseen any likelihood of serious emotional disturbance because Sunoco had no fiduciary

duty toward Hoai and was merely following its own interests. Accordingly, under normal contract law, Hoai would not be able to recover damages for emotional disturbance. [-12-]

Moreover, it is not clear that Congress meant to allow plaintiffs to recover damages fox emotional disturbance in the actual damages phase. As stated above, damages for emotional disturbance are rarely awarded. More fundamentally, the Act removes the issue of exemplary damages from the jury. See 15 U.S.C. § 2805(d)(2). This provision apparently evidences a desire to remove emotional, potentially inflammatory testimony from before the jury. Evidence of emotional disturbance is clearly inflammatory. Accordingly, it would appear that under the Act damages for emotional disturbance may only be recovered in the exemplary damages phase.

B.

More generally, Hoai appears to contend that he should recover for damages proximately caused by Sunoco's actions. If Sunoco had committed a tort, proximate cause would be the proper test for damages. The purpose of damages in tort is to "place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred." H. McCormack, Handbook on Damages 562 (1935). By contrast, "damages for breach of contract should place the plaintiff in the position he would have been in if the contract had been fulfilled." Id. The proper test for such damages is whether the plaintiff's loss "was foreseeable as a probable result of a breach." Restatement (Second) of Contracts, § 351(2); see also id. § 351(1) ("Damages are not recoverable for loss that the party in breach did not [-13-] have

reason to foresee as a probable result of the breach when the contract was made."). Accordingly, in order to establish the relevance of any evidence of damage, Hoai must present evidence that those damages were foreseeable at the time the parties entered into the franchise relationship. See Fed. R. Evid. 104(b).

Hoai also argues that he should be able to seek "special" damages. Special or consequential damages are available for losses that result from "special circumstances, beyond the ordinary course of events, that the party in breach had reason to know." Restatement (Second) § 351(2)(b). They are really a special category of contractual damages. General damages are those damages which flow naturally from a breach so that a reasonable person would foresee them without any special knowledge of the

plaintiff's circumstances. Special damages are unusual damages that a reasonable person would not see without such knowledge. Because special damages are normally recoverable in contract actions, there is little reason to doubt that special damages may be awarded under the Act -- provided, of course, that Hoai can prove that Sunoco had reason to know of the special circumstances making that damage foreseeable before the contract was made.

C.

Finally, Hoai contends that the Order of February 28, 1991 misconstrued the time frame during which damages may be recovered [-14-] under the Act. The Order stated in relevant part:

> Defendant has moved in limine for an order which would require damages to be measured by the profits earned at the Sun station located at 2305 Pennsylvania Avenue from September 8,

> 1986 to April 27, 1987. The proof of damages so measured will be so limited unless and until the plaintiff has evidence that the franchise would have extended beyond April 27, 1987 but for the "termination" on September 8, 1986. However, plaintiff shall be permitted discovery with respect to any evidence or leads to evidence which would support a demonstration that the franchise and, hence plaintiff's profits (if any), would have extended beyond April 27, 1987. If he discovers such evidence, he may move for leave of the Magistrate Judge to seek further discovery with respect to profits of the station beyond that date.

Order of February 28, 1991 para. 1. Hoai argues that this ruling artificially limits the damages that may be recovered under the Act to the period of the franchise contract between Hoai and Sunoco. This criticism is misplaced.

It is true that the franchise contract expired on April 27, 1987. [sic: "Sunoco terminated Hoai on September 8, 1986 without notice in violation of the Act", Oberdorfer, J., in his memorandum of Oct.

1, 1990, part D] It is also true that the Act prohibits franchisors not only from terminating franchisees, but also from failing to renew them without sufficient cause, see 15 U.S.C. § 2802, and that terminated franchisees may recover damages for lost profits beyond the term of the last contract. See, e.g., Thompson v. Kerr-McGee Refining Corp., 660 F.2d at 1388. It is not, however, true that the Order of February 28, 1991 determined that under the Act franchisees may only recover damages for the period covered by the latest franchise contract. The Order clearly allows Hoai, as a matter of law, to prove damages beyond the [-15-] contract period -- provided that he present evidence that his franchise would not have been terminated by then.

This is an evidentiary holding, not an interpretation of the Act. The Federal

Rules of Evidence require that "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Fed. R. Evid. 104(b). The Order simply recognizes Hoai has failed so far to establish a foundation for evidence of damage beyond April 27, 1987. Because, however, Hoai apparently fails to grasp the basis of this ruling, it will be useful to set it out here.

The as-yet undisputed facts demonstrate that Sunoco desired to extricate itself from the conflict between Hoai and Vo. On September 8, 1986, it tried to remove itself as a party to that conflict by agreeing to supply motor fuel to Vo until the conflict was resolved. See Memorandum of October 31, 1990 at 3 - 4.

Later it informed Hoai of its intention to terminate his franchise, which it thought it did on April 27, 1987. See id. at 4 - 5. Hoai has presented no evidence suggesting that Sunoco would have continued him as a franchisee. Accordingly, it appears at this point to be undisputed that Sunoco wanted to terminate Hoai by April 27, 1987 at the latest.

It also appears that Sunoco had proper grounds for doing so. In the letters Sunoco sent to Hoai, it pointed to Hoai's failure to perform up to Sunoco's expectations and to his failure to comply with the record keeping provisions of the franchise contract as grounds for termination. See id. Either of these justifications would have been sufficient to permit termination under the Act. See 15 U.S.C. § 2802(b)(1)(2). Indeed, Sunoco could have terminated Hoai on September 8, 1986 for

failing to manage the station personally for more than seven consecutive days if it had given him proper notice. See Memorandum of October 31, 1991 at 13; 15 U.S.C. § 2802(c)(9)(A). It chose, for reasons that are not apparent, not to do so until April 27, 1987. Nevertheless, all the evidence presented so far suggests that it would have terminated his franchise by that date.

Accordingly, the Order of February 18, 1991 informed Hoai that he would not be able to present evidence of damage incurred past April 27, 1987 unless and until he established a foundation for that evidence by presenting evidence that "but for" the termination on September 8, 1986 his franchise would have continued past April 27, 1987.

III.

Hoai has also moved to certify various questions relating to the Order of February

8, 1991. Interlocutory appeals are, however, not favored. They are allowed only if an order "involves a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). This memorandum demonstrates that most of Hoai's contentions were based upon a misunderstanding of the Order. The [-17-] one remaining contention is whether Hoai can recover damages in tort. Since there does not appear to be "substantial ground" for that contention, an interlocutory appeal on that issue would be inappropriate.

IV.

Accordingly, the accompanying order will deny plaintiff's motion for alteration and amendment of the Order of February 28, 1991 as well as his motion for certification.

DATE:
May 1, 1991 /s/ Louis F. Oberdorfer
United States District Judge
[-18-]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND	)	
MARKETING CO.	)	
Defendant.	)	

MEMORANDUM AND ORDER

On May 10, 1991, plaintiff Hoai filed a motion for partial summary judgment. Primarily, Hoai argues that the letters sent by defendant Sun Oil on March 2, 1987 and January 22, 1987 are not relevant to the issue of damages because they "are not relevant to any expectation which Sun by its words and acts raised in Hoai before the actual termination . . . ." Plaintiff's Motion for Summary Judgment at 5. This is incorrect. Under the franchise agreement between the parties, Hoai could reasonably expect to continue the franchise in the

absent of sufficient cause to terminate his franchise. The letters of January 22, 1987 and March 2, 1987 indicate that there was such cause. See Memorandum of May 2, 1991, at 16. letters are clearly relevant to the issue of damages.

Hoai now suggests that Sun Oil is estopped from raising such concerns because it, not Hoai, is responsible for the poor performance of the gas station. Specifically, "the termination of Hoai and the giving of his station to Vo by Sun prevented Hoai from having any effect whatsoever on the performance of the Thus, the [-1-] station." See Plaintiff's Motion for Partial Summary Judgment at 10 - 11. There is, however, no evidence that Sun Oil "gave" the station to Vo -- the temporary restraining order issued by the Superior Court did that -- or that Sun Oil in any way prevented Hoai from recovering his

station. Moreover, Sun Oil was under no duty to aid Hoai. See Memorandum of May 2, 1991 at 6 - 7. Thus, as intimated in several previous orders from this Court, the notices of nonrenewal sent by Sun Oil in 1987 are relevant to the issue of damages.

Hoai also seeks to establish certain facts as undisputed. Although his original motion for summary judgment was not accompanied by a proper statement of material facts under Local Rule 108(h), he has now filed such a statement. Defendant Sun Oil, however, has not clearly indicated which facts it claims are in dispute. Accordingly, this Order will require defendant to file a statement of material facts in genuine issue. That statement should be in numbered paragraphs corresponding the numbered paragraphs in plaintiff's statement, and in each numbered

paragraph defendant shall indicate whether there is a genuine issue as to the facts identified by plaintiff in the corresponding paragraph and, if there is, the evidence in the record raising that issue.

Accordingly, it is this 3rd day of June, 1991, hereby

ORDERED: that Plaintiff's Motion for Partial Summary Judgment on Certain Questions of Damages should be, and is hereby, denied; and it is further [-2-]

ORDERED: that defendant shall file a statement of material facts in genuine issue on or before June 14, 1991.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND	)	
MARKETING CO.	)	
Defendant.	)	

MEMORANDUM

I.

An October 1, 1990 Order granted plaintiff a partial summary judgment that defendant Sun Refining and Marketing Company, Inc. ("Sun") terminated its franchise agreement with Hoai without the notice required by the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, et seq. (1988) ("the PMPA") when, pursuant to a Superior Court Consent Order it supplied its petroleum products to Thanh Van Vo instead of the plaintiff at the service station at 2305 Pennsylvania Avenue, S.E.

which it had leased to plaintiff. On October 11, 1991, after a five day trial, a jury awarded plaintiff $65,000.00 in compensatory damages.

Plaintiff's Complaint claimed $15,000,000.00 in exemplary damages.[1] On July 11, 1991, defendant filed a Motion for Summary Judgment on the Issue of Exemplary Damages and plaintiff responded [-1-] with an Opposition to Summary Judgment on the Issue of Exemplary Damages on August 5, 1991. Following the jury verdict on October 11, 1991, the Court offered counsel the opportunity to argue the motion at that time; plaintiff indicated that he was not prepared. Accordingly, the Court stated from the Bench that the Motion was submitted on the

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[1] On October 11, 1991, plaintiff filed a supplemental Motion for Summary Judgment on Exemplary Damages reducing the exemplary damage claim to $650,000.00.

papers with the benefit of the evidence adduced at the trial on compensatory damages.

II.

The Petroleum Marketing Practices Act provides that a franchisee is entitled to exemplary damages if the franchisor acted in "willful disregard of the requirements [of the PMPA] or the rights of the franchisee" and such damages are to be granted only "where appropriate." § 2805(d)(1)(B) (emphasis added). Exemplary damages are a responsibility of courts without a jury. The Court in Eden v. Amoco Oil Co., 741 F. Supp. 1192 (D. Md. 1990) held that the determination of "willful disregard" in the context of the PMPA

> "describes conduct that is pursued with a consciousness of wrongdoing or with a considered disregard to whether it violates the Act. It requires more than deliberate conduct that, in fact, violates the Act, so that an aspect of guilty knowledge or

> imputed guilty knowledge is required. As used in the Act, however, willfulness does not encompass a requirement of showing maliciousness in motive.

Eden 741 F. Supp. at 1195. See also Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). While the Eden Court in analyzing the PMPA relied upon the decisions in Thurston and McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988) that determined "willfulness" in connection with the Age Discrimination in Employment Act, and the Fair Labor Standards Act respectively, rather than the PMPA, Eden's rationale is useful with regard to the burden placed on the plaintiff to prove a deliberate or willful act. In McLaughlin, the Court specifically examined the term "willful" as a qualifier stating that:

> In common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate," and "intentional." The work "willful" is widely used in the

> law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness that was adopted in Thurston-- that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute--is surely a fair reading of the plain language of the [Fair Labor Standards Act].

Id. at 133, (citation omitted). Therefore, in the context of the PMPA it is reasonable to use the term "willful" to indicate an act that is not merely negligent but can be said to have been taken with deliberate or intentional disregard to the requirements of the statute.

When the Courts have considered the term "willful disregard" with respect to the PMPA, they have been reticent to award exemplary damages absent a clear and affirmative showing of a deliberate and intentional act on the part of the

defendant. In Midwest Petroleum Co. v. American Petrofina Mktg. Inc., 644 F. Supp. 1067 (E.D. Mo. 1986) the Court concluded that

> [I]n light of the paucity of case law interpreting the PMPA and the difficulty of the issues in this case, the Court cannot say that defendant's actions manifested a willful disregard' of the requirements of the PMPA or plaintiff's rights thereunder such that exemplary damages would be appropriate. Accordingly, plaintiff's request for exemplary damages is denied."

644 F. Supp. at 1072. See also Noe v. Mobil Oil Corp., 503 F. [-3-] Supp. 213 (E.D. Mo. 1980) (holding that absent a showing of "willful disregard" franchisee was not entitled to punitive damages under the PMPA for an "alleged wrongful attempt by oil corporation to terminate trial franchise." Id. at 214.); Clark v. Mobil Oil Corp., 496 F. Supp. 132 (E.D. Mo. 1980) (where a plaintiff continued to operate a

gasoline station throughout the litigation and sustained no actual damages other than nominal ones the court noted that a technical violation of the PMPA was not in "willful disregard" thereof and did not award punitive damages).

The plaintiff in this case has not made such a clear and affirmative showing of the willful disregard that would justify an award of exemplary damages. The de facto termination effected September 8, 1986 (unlike the final termination of April 27, 1987, pursuant to the formal notice dated January 22, 1987) was not something initiated by defendant. Sun continued to deliver its products to the Pennsylvania Avenue station and to Hoai as long as he was present in the station. On about May 15, 1986, Thanh Van Vo took over possession of the station premises from Hoai without any participation by Sun.

When, for reasons beyond Sun's control, Vo occupied the station, Sun continued to deliver its products there. But Hoai, through no fault of Sun, was not operating a gasoline station during that interim period and, therefore, Sun could not have continued to deliver their petroleum products to Hoai there or at any other location. In fact, on August 26, 1986, when Hoai returned to the premises, and Vo had left, Sun continued to deliver their petroleum products to the Pennsylvania Avenue [-4-] station.

It is undisputed that, but for the intervention of the Superior Court's August 29, 1986 Temporary Restraining Order displacing Hoai, restoring Vo to possession, and requiring Sun to continue delivery to the station with Vo in possession, Hoai would have remained in possession of the premises, there to

receive Sun's petroleum products. During the ten day period of the Temporary Restraining Order's validity, Sun, consulting with and acting through counsel, entered into a Consent Order, approved by the Superior Court, that

> Plaintiff [Vo] and Sun . . . agreed that the terms and conditions of the Temporary Restraining Order should be continued with respect to Plaintiff and Defendant Sun . until March 31, 1987 or the prior resolution of the dispute between Plaintiff and Defendant Thanh Vong Hoai over rights to operate the . . . station . . .

There is direct and undisputed evidence in the form of the deposition of Joseph D. Zulli, that at the time of the Consent Order, Sun was unaware that by entering into and abiding by that agreement, without formal statutory notice to Hoai, it terminated plaintiff's franchise, a fact first recognized by Sun when, on October 1, 1990 this Court so ruled. See Deposition of Joseph Dennis Zulli, Esq., Chief

Counsel for Branded Marketing and Lubes for Sun, June 17, 1991 at 56. Moreover, there is no evidence that Sun was specifically attempting to terminate its relationship with Hoai. Conversely, the Consent Order establishes, by a negative pregnant, that, if and when the dispute about possession between Hoai and Vo was resolved in favor of Hoai, Sun would continue to provide its products to the station occupied by Hoai during the [-5-] remaining term of its franchise agreement with him.

It is manifest from this voluminous record that Sun's lawyers, focusing on the Superior Court proceeding, and Sun, relying on its lawyers, disregarded the PMPA.[2] But there is no showing that

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[2] See Affidavits of Jeffrey W. Wagner and David C. Roseman, and excepts from the depositions of Harold J. Vaughn and Joseph D. Zulli, Esq.; Defendant's

either Sun or its lawyers willfully or recklessly, as distinguished from carelessly, disregarded the notice and other requirements of the PMPA when Sun agreed to and subsequently complied with the Consent Order.

The undisputed facts preclude a finding that Sun acted "with a consciousness of wrongdoing or with a considered disregard to whether it violated the Act." Eden, 741 F. Supp. 1192 (D. Md. 1990). As this Court ruled, Sun's "participation in the Consent Order violated the notice requirement of the PMPA and a jury has awarded plaintiff a handsome damage award of $65,000.00 in recognition of that fact. It may be, as a matter of local law, that the Consent Order was not

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Motion for Summary Judgment on the Issue of Exemplary Damages filed June 11, 1991 (attachments).

enforceable by the contempt power of the Superior Court. However, that fact would not satisfy plaintiff's obligation to come forward with evidence of willful disregard of the PMPA by Sun when, in the unique circumstances of this case, Sun failed to provide a federal statutory notice before agreeing to the Consent Order proposed to it by Vo's counsel. Moreover, Sun had no fiduciary or other duty to resolve the dispute between Hoai and Vo. Hoai, himself, failed to effectively pursue [-6-] simple local law remedies which could have resolved that dispute. Moreover, Sun demonstrated that, relying on legal advice, it did not appreciate the illegality of its participation in the September 8, 1986 Consent Order. As the Court in Eden noted, "[S]eeking a lawyer's advice does not, immunize one's action. But it is evidence to be considered in determining whether a

decision was made in willful disregard of statutory obligations." Eden 741 F. Supp. at 1196; see also Thurston, 469 U.S. at 129.

Sun's actions show no considered disregard of the PMPA but rather a practical business judgment in a difficult situation created by others. Sun relied on legal advice that turned out to be wrong. But Sun's conduct is not punishment the "appropriate" recourse. so egregious as to make The circumstances in this case are so unique and the role of Sun so passive that it would not be "appropriate" to impose sanctions either as an example or as a deterrent to others.

III.

On the basis of the entire record, including plaintiff's October 11, 1991 filing, an accompanying Order will grant defendant's Motion for Summary Judgment and

dismiss plaintiff's claim for exemplary damages.

Date: Oct. 25, 1991

/s/ Louis F. Oberdorfer
United States
District Judge

[-7-]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND MARKETING CO. INC.,	)	
Defendant.	)	

MEMORANDUM AND ORDER

Summary judgment is hereby granted to defendant limiting damages to be awarded to plaintiff to the period ending April 27, 1987. The undisputed material facts establish that:

1. The original franchise relationship between plaintiff and Sun was for one year ending March 31, 1987.

2. On January 20, 1987, defendant delivered to plaintiff a notice of intent to terminate the franchise relationshp because sales were below the volume historically sold at that station. The

notice recognized that the disappointing results were largely due to distractions caused by the dispute between plaintiff and Vo.[1] The notice also cited plaintiff's failure to comply with defendant's record keeping and inventory control program.

Plaintiff has not disputed these facts or proffered any [-1-] evidence of material facts which would justify a conclusion that the franchise survived the January 20 notice. [sic: Oberdorfer, J., "Sunoco terminated (the franchise of) Hoai on September 8, 1986 without notice in violation of the Act." Memorandum of Oct. 1, 1990, of Oberdorfer, J.]

Plaintiff proffers that there was a

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[1] Internal memoranda written contemporaneously to the decision to terminate evidence that these reasons stated in the January 20 letter were the genuine reasons for the termination there noticed.

conversation with defendant about a five-year relationship. Defendant disputes this assertion with sworn testimony. However, even if there were such a conversation, it is determined as a matter of law that the written agreement between the parties for a one year trial relationship would preclude admission of testimony about a conversation about a five year term. Moreover, the trial relationship was terminated by a timely written notice (5 U.S.C. § 2803). Thus, the letter termination notice of January 20, 1987, effectively terminated any contract or franchise relationship which might have been formed by the alleged convervation.

Accordingly, for reasons stated in a Memorandum filed October 1, 1990, the defendant's Motion on the Limitation of Damages should be, and is hereby, GRANTED.

Date: /s/ Louis F. Oberdorfer
Sept. 16, 1991 UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND MARKETING CO.,	)	
	)	
Defendant.	)	

ORDER

For the reasons stated in the accompanying Memorandum, plaintiff's motion for summary judgment should be granted and defendant's cross-motion denied. Because of this disposition, many of the motions filed in this case are now moot. Accordingly, it is this 1st day of October, 1990, hereby

ORDERED: that defendant's cross-motion for summary judgment (Docket No. 94), should be, and is hereby, DENIED; and it is further

ORDERED: that plaintiff's motion for summary judgment (Docket No. 75), and plaintiff's renewal and expansion of his summary judgment motion (Jan. 12, 1990), should be, and are hereby, GRANTED as to the question of defendant's liability under the Petroleum Marketing Practices Act; and it is further

ORDERED: that plaintiff's motion for partial summary judgment on statute of limitations claims (Docket No. 134) has been conceded and is therefore DENIED AS MOOT: and it is further [-1-]

ORDERED: that plaintiff's motion for enforcement of waiver by defendant (Docket No. 153) is also DENIED AS MOOT; and it is further

ORDERED: that plaintiff's motion for interpretation of ambiguity against the defendant (Docket No. 156) is DENIED AS MOOT; and it is further

ORDERED: that plaintiff's motion under Weinberger v. Scully (Docket No. 155) is DENIED AS MOOT; and it is further

ORDERED: that plaintiff's motion to preclude estoppel claims (Docket No. 158) is DENIED AS MOOT; and it is further

ORDERED: that plaintiff's motion for, inter alia, additional discovery (Docket No. 112) is DENIED AS MOOT; and it is further

ORDERED: that counsel shall attend a status conference on October 17, 1990 at 9:15 a.m.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

[-2-]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456-LFO
SUN REFINING AND MARKETING CO.,	)	
	)	
Defendant.	)	

NOTICE

On May 20, 1991, defendant informed the Court that it had not been provided with a description of the pretrial statement required by Order of March 18, 1991. That description is set forth below:

(A) The Pretrial Statement of each party shall include as separately titled and numbered sections:

(i) a statement of the case;

(ii) a statement of claims made by the Party:

(iii) a statement of defenses raised by the parties;

(iv) a schedule of witnesses to be

called by the party:

(v) a list of exhibits to be offered in evidence by the party;

(vi) a designation of depositions, or portions thereof, to be offered in evidence by the party;

(vii) an itemization of damages the party seeks to recover: and

(viii) a request for other relief sought by the party. [-1-]

(B) The statement of the case shall set forth a brief description of the nature of the case, the identities of the parties, and the basis of the Court's jurisdiction.

(C) The statement of claims shall set forth each claim a party has against any other party (including counter-, cross-, and third-party claims), and the party or parties against whom the claim is made.

(D) The statement of defenses shall set forth each d_fense a party interposes to a claim asserted against it by any other party, including defenses raised by way of general denial, without regard to which party has the burden of persuasion.

(E) The schedule of witnesses shall set forth the full names of all witnesses the party intends to call if not earlier called by another party; a brief description of the testimony to be elicited from the witness; and an estimate of the time the party will take in eliciting such testimony. Expert witnesses shall be designated by an asterisk. A party need not list any witness from whom it expects to elicit testimony only by way of cross-examination.

No objection shall be allowed to a witness or to testimony first disclosed in a party's Pretrial Statement unless the party objecting has unsuccessfully sought to learn the identity of the witness or the substance of the testimony by discovery, and the court or magistrate finds the information to have been wrongfully withheld. [-2-]

(F) The list of exhibits shall set forth a description of each exhibit the party intends to offer in evidence (other than those created at trial). Exhibits shall be listed by title and date. Exhibits will be presumed to be authentic unless objection to their authenticity is made at or before the final Pretrial Conference and the objection is sustained.

(G) The designation of depositions shall identify each deposition or portion thereof (by page and line numbers) the party intends to offer in evidence. Any cross-designation sought by any other party pursuant to Rule 106, Federal Rules of Evidence, must be made at or before the final Pretrial Conference.

(H) The itemization of damages shall set forth separately each element of damages, and the monetary amount thereof, the party claims to be entitled to recover

of any other party, including prejudgment interest, punitive damages and attorneys' fees. No monetary amount need be set forth for elements of intangible damage (e.g., pain and suffering, mental anguish, or loss of consortium).

(I) The request for other relief shall set forth all relief, other than judgment for a sum of money, the party claims to be entitled to receive against any other party.

(J) To the extent possible, the parties shall submit stipulations of fact agreed upon or proposed by the parties.

(K) In nonjury cases, each party shall submit proposed findings of fact and conclusions of law.

(L) If either party has demanded a trial by jury, each shall attach as appendices to the Pretrial Statement:

(i) A proposed list of questions to be

asked of the jury panel by the Court in voir dire examination.

(ii) A preliminary set of proposed instructions to the jury which identify relevant D.C. Bar form book instructions and the authorities relied upon for any special instructions proposed. A xeroxed copy of all requested jury instructions (as distinguished from a mere list of standardized instructions) shall be submitted to the Court.

(iii) A proposed verdict form for a special verdict requested.

May 20. 1991 /s/ Louis F. Oberdorfer
UNITED STATES
DISTRICT JUDGE

[-4-]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(CIVIL DIVISION)

THANH VONG HOAI, Plaintiff	[FILED:6-28-91]
vs.	CA No.
SUN REFINING AND MARKETING CO.,	87-2456 LFO/PJA
Defendant	

Supplemental Pretrial Order

A Memorandum of October 1, 1991 found, based upon the undisputed facts, that defendant Sun Refining and Marketing Company ("Sun Oil") had violated the Petroleum Marketing Practices Act, 15 U.S.C. Section 2801 et seq., by entering into a consent order with Thanh Van Vo on September 8, 1986. Accordingly, an accompanying order entered partial summary judgment in favor of plaintiff Hoai and scheduled further proceedings to determine what damages were due to him. On June 24, 1991, the parties attended a pretrial conference to schedule further proceedings,

to resolve outstanding disputes, and to plan the trial on damages. This order memorializes the rulings in that conference.

1. Trial shall commence on October 7, 1991, at 10:00 a.m. Trial on actual damages will be before the jury. Trial on the issue of exemplary damages, if necessary, will be conducted separately before the Court.

2. No deviations from this order will be permitted unless the affected party specifically requests amendments and alterations to this order. Those requests may be made on or before September 9, [-2-] 1991 and will be considered at a conference on September 16, 1991 at 1:45 p.m. Subsequent requests for altering this order will not be considered.

3. Hoai has indicated in his pretrial statement that he intends to present

evidence of damages beyond April 27, 1987. An Order of February 28, 1991 determined that proof of damages would be limited to the period from September 8, 1986 until April 27, 1987 "unless and until plaintiff has evidence that the franchise would have extended beyond April 27, 1987 but for the 'termination' on September 8, 1986." As elaborated in a subsequent memorandum, this ruling does not prevent Hoai as a matter of law from recovering damages for the period beyond his contract with Sun Oil. See Memorandum of May 2, 1991 at 15-16. It does, however, recognize that the length of Hoai's franchise was limited by Sun Oil's right, which was in turn limited by the Petroleum Marketing Practices Act, to terminate or nonrenew the franchise and that Sun Oil had presented evidence that it would have legitimately invoked that right had it not earlier terminated Hoai by

entering into the consent agreement. See id. at 16-17. At the pretrial conference, Hoai was asked whether he had any evidence raising a genuine issue as to Sun Oil's intent or right to terminate him on April 27, 1987. He proffered testimony that when he entered into the franchise agreement with Sun Oil, he and a Sun Oil representative discussed a five year relationship. this evidence is, however, entirely consistent with the evidence that, once it found Hoai enmeshed in his conflict with Vo, Sun Oil decided to terminate the franchise at the end of the first year. As a consequence, there does not [-3-] appear to be a genuine issue as to whether Hoai may only recover for lost profits from September 8, 1986 to April 27, 1987. Accordingly, the rest of this order will proceed upon the assumption that Hoai may recover damages only for the period between

September 8, 1986 and April 27, 1987.

Final resolution of this issue must, however, await proper briefing. According, defendant may file a motion for summary judgment on this issue on or before August 1, 1991 to which plaintiff should file an opposition on or before August 20, 1991.

4. As explained in the Memorandum of May 2, 1991, Hoai may recover only damages in contract. That means that damages will be measured by lost profits plus incidental and consequential damages minus the costs avoided because of the loss of the franchise. At trial, Hoai will present evidence of lost profits, first by extrapolating from the profits earned in the several weeks that he worked at the station. Second, he will present evidence of the profits earned by Vo and then extrapolate his own earnings by taking into account his allegedly superior experience

in managing gasoline stations. Third, Hoai may introduce evidence concerning the profitability of the station at 2305 Pennsylvania Avenue and of service stations in the Washington metropolitan area from 1977 to 1990.

5. In its pretrial statement, Sun Oil indicated that it plans to present testimony from Vo and from Ernest Peele that Hoai did not put forward any of his own capital for the franchise at 2305 Pennsylvania Avenue, S.W. Because Hoai will not attempt to extrapolate lost profits from his capital investment, this [-4-] testimony is irrelevant.

6. The number of gallons delivered to and sold at 2305 Pennsylvania from 1977 until 1990 is relevant to the calculation of lost profits. Furthermore, there should be no dispute over these figures. Accordingly, the parties should show cause

on or before July 8, 1991 why they cannot stipulate these figures for trial.

7. Hoai has moved to strike the testimony of defendant's expert witness on the ground that the testimony of all of his experts except Rodney Sisk was stricken by the Magistrate Judge's Order of June 5, 1991. Hoai claims that Sun Oil's expert witness was named after June 5, 1991 and should therefore be struck as well. Sun Oil's counsel has, however, represented, and Hoai has not disputed, that Sun Oil's expert witness was identified to Hoai on May 24, 1991. Accordingly, Plaintiff's motion to strike defendant's expert witness should be, and is hereby, denied.

8. If Hoai's motion to reconsider the Magistrate Judge's Order striking the testimony of his expert witnesses besides Sisk is granted, it is nonetheless clear that the testimony of Lyndal Shaneyfelt

will not be allowed because it is not relevant to Hoai's theory of damages. More fundamentally, it is not clear whether any of Hoai's proffered experts have sufficient expertise to testify on the subjects on which they are scheduled to testify. Sisk is supposed to testify as to the reasonable expectations for the station. As an experienced gasoline station owner, he certainly has some expertise, but since it is unclear on what issues Sisk will testify, it is also unclear whether that expertise applies to his expected testimony. Similarly, Hoai seeks to present testimony from Joel Loesch, an accountant, on the profitability of the station at 2305 Pennsylvania Avenue. Here again, it is unclear whether Lesch's training or his general experience with small businesses qualifies him as an expert on the profitability of gasoline

franchises. Accordingly, Hoai should be, and is hereby, ordered to provide Sun Oil on or before July 9, 1991 with a report from each expert that he plans to present indicating the opinions those experts plan to offer at trial, the factual basis and assumptions underlying each of those opinions, and a description of the witnesses' expertise. Sun Oil should be, and is hereby, ordered to provide a similar report from its expert by that time.

9. Discovery in this matter has been closed. It appears, however, that the parties may benefit from additional discovery concerning the profits allegedly lost by Hoai due to the termination of his station. Furthermore, it appears that a deposition of Linda Fidel-Graham may further a just resolution of this matter. Accordingly, it is hereby ordered that the parties may conduct discovery on these

subjects on or before July 23, 1991.

10. Hoai will present the following witnesses and will be allotted the following amounts of time for direct examination of those witnesses:

a. Thanh Vong Hoai (2 hours)

b. Ernest Peale (35-40 minutes)

c. Mrs. Thanh Vong Hoai (5-10 minutes)

d. Alvin Wall (10 minutes)

e. Rodney Sisk (1 hour)

f. Joel Lesch (30 minutes)

g. Harry Murphy (30 minutes)

h. Linda Fidel-Graham (30 minutes)

i. Joseph Zaluski (30 minutes).

11. Sun Oil will present the following witnesses and be allotted the following amounts of time for direct examination of those witnesses:

a. Ernest Peele (1 1/2 hours)

b. Harold D. Vaughn (2 hours)

c. Melvin Sherbert (1 hour)

d. Than Vanh Vo (2 hours)

e. James Filby (2 hours)

f. Linda Fidel-Graham (1 hour)

12. It is unclear whether there is a genuine issue of material fact as to punitive damages. Although there is considerable evidence that Sun Oil knowingly entered into the consent agreement on September 8, 1986, it is not clear that, given the inchoate state of the law on the PMPA at that time, Sun Oil could have done so in willful disregard of the law. Accordingly, defendant may file a motion for summary judgment on this issue on or before July 15, 1991 to which plaintiff shall reply within 20 days thereafter.

13. Plaintiff has moved to reconsider the magistrate's order denying a motion to compel answers from My-Linh Soland. Soland

represented Hoai in his conflict with Vo. Because that issue is not relevant to the issues to be considered at trial, plaintiff's motion to reconsider the magistrates' ruling denying plaintiff's [-7-] motion to compel complete and truthful responses from a witness should be, and is hereby, denied.

14. On June 6, 1991, Hoai moved to disqualify Sun Oil's counsel, J. Gordon Forrester, on the grounds that he was calling Forrester as a witness. At a pretrial conference, this motion was granted in part and denied in part. In light, however, of the testimony that will be presented at trial on actual damages, this motion must be denied because the proffered testimony of Forrester is not relevant in the actual damages phase. Furthermore, according to Hoai's pretrial statement, Forrester will testify about Sun

Oil's decision to enter into the September 8, 1986 consent agreement with Vo. Hoai has, however, named four other witnesses who will testify on the same subject. As a consequence, it does not appear that Forrester is a necessary witness under Rule 3.7 of the Rules of Professional Conduct. Accordingly, upon further consideration, Hoai's motion to disqualify should be, and is hereby denied.

15. All further briefing in this matter shall be fifteen pages or less unless prior leave of Court has been granted.

/s/Louis F. Oberdorfer
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7133, et al. September Term, 1993
87cv02456

THANH VONG HOAI,
Appellant,

v.

FILED: MAR 25 1994
Ron Garvin, Clerk

Sun Refining and
Marketing Company, Inc.,
Appellee

and Consolidated Case No. 92-7134

Before: Edwards, Buckley and Randolph, Circuit Judges.

O R D E R

Upon consideration of appellant's petition for rehearing, filed April 8, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert H. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7133, et al. September Term, 1993
87cv02456

THANH VONG HOAI,
Appellant,

v.

FILED: MAY 25 1994
Ron Garvin, Clerk

Sun Refining and
Marketing Company, Inc.,
Appellee

and Consolidated Case No. 92-7134

Before: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges.

O R D E R

Appellant's Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert H. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI 927 N. Highland St. Arlington, Va. Plaintiff, v. SUN REFINING AND MARKETING COMPANY, INC. 1801 Market Street Philadelphia, Pa. 19103 Defendants.	)C.A.87-2456-) LFO) [Filed:) Sept. 5,) 1987) 9:25 pm]

VERIFIED COMPLAINT UNDER THE FEDERAL PETROLEUM MARKETING PRACTICES ACT 15 U.S.C. 2801, ET SEQ. FOR DAMAGES AND FEES AND FOR DECLARATORY RELIEF

This is a case by a retailer-franchisee against a refiner-franchisor under the Federal Petroleum Marketing Practices Act, ("Act") 15 U.S.C. 2801, et seq., for violations of that act including an improper termination of the franchise of the plaintiff under the Act by which

plaintiff's business was destroyed and his business reputation and livelihood severely damaged. Plaintiff alleges against the defendant as follows:

I.

JURISDICTION

1) Jurisdiction is conferred on this Court, and this action is authorized by 15 U.S.C. 2805 (a), 28 U.S.C. 1331, 28 U.S.C. 1343, 28 U.S.C. 2201, and 28 U.S.C. 2202.

II.

VENUE [-2-]

2) Jurisdiction and venue repose in this Court because the service station in question, where the plaintiff did his business as a franchisee until improperly terminated by the defendant, is located in the District of Columbia at 2305 Pennsylvania Avenue, S.E. and therefore the plaintiff, under 15 U.S.C. 2805 (a) brings

action in this Court.

III.

PARTIES

3) Plaintiff, THANH VONG HOAI, ("Hoai") is an adult resident and citizen of the United States who resides at the above address in Arlington County, Virginia.

4) Plaintiff has had much experience in operating filling stations, body shops and related businesses in the United States since 1976. He has been an employee of the defendant prior to the events complained of herein, including serving as a supervisor for defendant of a number of their service stations in the Washington D.C. metropolitan area.

5) On a prior occasion to the one complained of herein, plaintiff was a dealer or franchisee for the defendant in Greenbelt, Maryland. That dealership lasted

for two years more or less.

6) Plaintiff, prior to the improper termination complained of herein, was a franchisee of the defendant as that term is defined in the Act.

7) Defendant, SUN REFINING AND MARKETING COMPANY, INC. ("Sun") is a major oil company whose main offices are in Philadelphia, Pennsylvania and which owns and/or franchises many [-2-] service stations in a number of states, particularly in the mid-Atlantic area of the country.

8) Defendant Sun is a franchisor as that term is defined in the Act and leased and franchised to the plaintiff Hoai the Sunoco service station site and business located at 2305 Pennsylvania Avenue, S.E., in the District of Columbia, which is the subject of the termination complained of.

IV.

FACTS

9) In March of 1986, plaintiff was encouraged by one Ernie Peele, area manager for defendant Sun, to apply for the franchise for the service station in question and did so.

10) In connection with this application, plaintiff was informed that he would need about $70,000.00 in capital to make a success of the contemplated Sun franchise.

11) Plaintiff had available from family sources approximately $35,000.00, or half this amount.

12) Previously plaintiff had been approached on several occasions by one Thanh Van Vo, another ethnic Vietnamese whom he knew slightly, to take a friendly loan if plaintiff needed it to start any new business, this Vo claiming, falsely, as it turned out, to own and operate a large

construction business.

13) On March 21, 1986, plaintiff and this Vo met with Ernie Peele, defendant's area manager, in the restaurant and coffee shop of the Howard Johnson's Motor Hotel on U.S. Route 1 in Alexandria, Virginia.[-3-]

14) There plaintiff introduced this Vo to Peele as the man who was going to lend him the other $35,000.00 that he needed to get the gas station franchise for the Pennsylvania Avenue station under way.

15) At this meeting Peele, in the course of his duties, questioned this Vo thoroughly about any partnership, hidden equity interest, high immediate interest, over hasty payback schedule or any other thing on the part of Vo that would hamper the utility of such a loan for a start-up franchisee such as plaintiff was in this instance and was informed by Vo that it was only a friendly loan at reasonable interest

to be paid back over time after a year or longer if necessary.

16) At this meeting this Vo agree to pay, as part of this loan, the initial deposit fees for the franchise, totalling $7,000.00 and Vo did disappear from the meeting for an unusually long time and returned to the meeting with two cashier's checks for the defendant totalling the $7,000.00 amount which he gave to Peele.

17) Later, plaintiff's application for the franchise was approved by the defendant at the required levels in Philadelphia and elsewhere and on March 31, the franchise agreement which is attached as Exhibit A hereto and incorporated, was entered into between the plaintiff and the defendant.

18) Though the said agreement is entitled trial franchise agreement it is as a matter of mixed fact and law a full franchise agreement because as a matter of

law under 2803(b)(1)(B), since plaintiff had previously been a franchisee [-4-] for defendant in Greenbelt, Maryland, he cannot have been a trial franchisee and regardless of the title of this agreement was entering and did enter a franchise agreement and lease on March 21, 1986, as a franchisee not a trial franchisee. See Exhibit B hereto, the earlier franchise agreement between the parties for the Greenbelt dealership which is incorporated by reference.

19) The man Vo claimed to plaintiff that he was putting up the money in the amount of $35,000.00 which he had promised by putting the money in the gas station bank account which he took sole control of under the pretext of protecting his money. Vo refused to let plaintiff have access to or signature for this account, but that was unknown to defendant Sun, who thought at

the time that the gas station account was under control of plaintiff.

20) In fact this was a fraud of the man Vo upon plaintiff in which he took control of the station account, took control of the station's daily receipts, and placed them into the account, drawing on them there. This Vo put no money that was actually his into the station account which he had established for his signature only at the McLean Bank in McLean, Virginia.

21) That something was wrong first was indicated to defendant on or about April 26, 1986, when the first check on this station account for the first load of gasoline from defendant for the station did not clear for insufficient funds and defendant notified plaintiff on that day. [-5-]

22) When plaintiff remonstrated with

this to the man Vo, and Vo's evident fraud, plaintiff was threatened by Vo and Vo's colleague Thach, with murder and physical damage to his person and the fraud soon turned to extortion.

23) After unsuccessful attempts to get law enforcement officials to help him and all the while being threatened with serious harm, plaintiff, in mid to late May began to tell Ernie Peele that he was being threatened with violence and murder.

24) In the meantime this Vo and others conveyed to plaintiff a credible threat that if he came to his own gas station franchise any more he would be killed and his family harmed.

25) Under duress, plaintiff was forced by Vo, his friend Thach, and a crooked lawyer, Arif, to sign a contract signing over all his interest in the gas station business to Vo for one dollar, which he was

never given.

26) In the meantime in a separate but related "scam" Vo, Thach and two other colleagues, aided by the same "street muscle," a gang of vicious Vietnamese thugs called the Çowboys, including one Minh, one Tong, one Lam and one Man, defrauded and extorted plaintiff and his family of their $35,000.00 capital and more, up to $49,000.00 in connection with the sale to plaintiff and his wife of an oriental specialty food shop on Wilson Boulevard in Arlington, Virginia and the compelling of the purchase of inventory for that business which was then seized illegally and converted. [-6]

27) Plaintiff told defendant's representative Peele and his boss, one Vaughn, also an employee of defendant, of these events as they occurred and asked the help of defendant continuously in getting

rid of these criminals who were victimizing him and in getting his station and franchise back.

28) Peele and Vaughn promised to help plaintiff on several occasions over the summer of 1986, from June 5 to August 28, 1986, as he proposed various plans to get his station back.

29) A number of these plans were stalled by the duplicity of plaintiff's then attorney, one My-Linh Soland, who, unbeknownst to plaintiff, was also representing some of those who were defrauding and extorting plaintiff.

30) After plaintiff dismissed attorney Soland upon learning of her duplicity and obtained a new attorney, the defendant's representative Peele again agreed to a plan to try and get plaintiff back his gas station franchise and business.

31) Under this plan Peele signed, as

the area representative of defendant Sun, a certification that plaintiff was the legitimate franchisee of the defendant. This certification was on a notice that plaintiff and his new attorney had drawn up for this man Vo and those he had brought into the station to quit the premises.

32) On August 25, 1987, plaintiff and his new attorney and his new attorney's grown son went to the station at 2305 Pennsylvania Avenue, S.E. and delivered this notice-to the manager of Vo, Vo not being there at the time. Vo's employees and henchmen quit the premises and subsequently Vo's attorney [-7-] came and agreed that his client would abide by the word of defendant Sun's representative Peele.

33) Instead of obeying this agreement of settlement, however the man Vo trumped up a sham complaint and TRO request on the 28th and took plaintiff into Superior Court

on a TRO hearing that was blocked out a day in advance but noticed only an hour or so before.

34) Vo and his counsel successfully eliminated plaintiff's representation at this hearing, by falsely claiming that his new attorney, who, was appearing pro bono, was a perpetrator of violence, a defendant and a witness, and getting him disqualified.

34) (sic) In the bizarre hearing that ensued the following day with yet another attorney for plaintiff herein, plaintiff herein, as a defendant therein, put on uncontradicted testimony of threats of murder and violence which was corroborated by Peele.

35) Vo declined to testify and subject himself to cross-examination.

36) The Superior Court ignored all this and interrupted the man Vo's case for

a TRO based on an alleged conversion to impose upon the case a wrongful idea of wrongful eviction by plaintiff against Vo, which had never been pleaded.

37) In an illogical leap based upon nothing but untruthful representations of Vo's then counsel, the Court found that Vo was a tenant of Sun, which, the evidence was clear and uncontested, was totally unknown to Sun. [-8-]

38) At this hearing, at Peele's request, the new lawyer obtained by plaintiff herein and his attorney and his attorney's son, represented Sun as well, Sun having been named as a defendant in that proceeding.

39) The Superior Court Judge, Wagner, issued a TRO for 10 days ordering plaintiff herein, his attorney and his attorney's son to turn over the station and what was on the premises and stay away from the station

for 10 days.

40) The TRO Judge promised plaintiff herein several times that he needn't be too concerned because it was only a TRO hearing and he would get a full hearing before there was any injunction.

41) However, there never was any such hearing. On September the 8th, 1986, without any notice to plaintiff herein or his attorney or his attorney's son, as the other defendants in that proceeding, the defendant herein, Sun, and the man Vo, the plaintiff in the Superior Court proceeding made a "deal" and in a manner unknown to plaintiff herein, persuaded another Superior Court judge, Eilperin, to enter a "consent" to extent the TRO for seven months as to Vo and defendant Sun only, giving the gas station to the man Vo and his colleagues for that time, effectively terminating and destroying plaintiff's

franchise and business. The original TRO expired as to plaintiff and his counsel and his counsel's son.

42) There was no notice of this proceeding beforehand to plaintiff and no explanation afterwards other than that Sun had to remain "neutral" and could not get involved in disputes [-9-] between plaintiff and Vo, his "friend."

43) How it was neutral to give plaintiff's station and business to a thug and extortionist has never been explained by Sun, though they insisted while giving the station to Vo that plaintiff was still their franchisee.

44) On information and belief, plaintiff states that defendant Sun's local counsel, one J. Gordon Forester, misrepresented to certain of the Sun personnel misleadingly and erroneously, as a matter of fact, that Sun had no choice

but to "extend" the TRO, for the said seven months when, in fact, the TRO by law, the rules, and its own terms, was set to expire in ten days of its own accord.

45) Sun ratified the acts of its agent and attorney, Forester.

V.

COUNT: VIOLATION OF THE
PETROLEUM MARKETING PRACTICES ACT:
UNLAWFUL TERMINATION

46) Plaintiff repeats and incorporates herein by reference the allegations of paragraphs 1) through 45) above.

47) The aforesaid "deal" of defendant Sun with Vo on September 8, whereby Sun agreed, without any notice or prior warning to or consultation with plaintiff to take his gas station franchise and de facto give it to Vo for seven months constituted a termination of plaintiff's franchise which was illegal under the Act. Vo had no valid claim to the franchise and was claiming it in violation of the PMPA and the franchise agreement, which Sun was bound by as much as the plaintiff. [-10-]

48) The termination of plaintiff's franchise was illegal in that it was a

termination prior to the conclusion of the term of the franchise agreement. 15 U.S.C. 2802(a)(1).

49) The defendant Sun did not give the notice required by Section 104 of the Act (15 U.S.C. 2804).

50) Since no notice at all was given prior to this termination of plaintiff's franchise, Section 2802 (b) of the act does not apply.

51) Even if this was not a termination (as it surely was,) in the alternative, defendant failed to renew the franchise at the end of this time during which they "extended" the TRO with Vo and did so in violation of the Act's applicable provisions.

52) The defendant's entire course of behavior throughout this ordeal and travail of the plaintiff was in violation of the strictures of the Act and the violations

were deliberate and in bad faith on the part of their agent and attorney Forester, whose acts defendant ratified and were therefore in willful disregard of the requirements of Sections 102 or 103 of the Act (15 U.S.C. 2802 or 2803) and/or the rights of the franchisee thereunder.

Wherefore, the plaintiff claims the full value of the franchise, which was terminated, over a span of twenty years, including all of his lost profits therein, according to the agreement as understood between himself and defendant, in excess of thirty million dollars ($30,000,000.00) and to exemplary damages in accordance with the Act and to reasonable attorney and expert witness fees and to a declaratory judgment that the act prevents disorderly transfers in violation of its terms in which [-11-] franchisors knowingly cooperate with wrongdoers and tortfeasors who they well

know are engaging in fraud and extortion.

A jury trial is respectfully demanded.

TANH VONG HOAI

by

/s/ Laurence A. Elgin
2762 Woodley Place, N.W.
Washington, D.C. 20008
(202) 628-1114
Bar No. 159582

/s/ John D. Hemenway
4816 Rodman St. N.W.
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Bar No. 379663

VERIFICATION

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA)

THANH VONG HOAI, being first duly sworn, deposes and says that he is the plaintiff named in this complaint that he has read the same, and that the statements contained therein are true and correct to the best of his knowledge, and, where stated or evident from the context, of his information and belief.

/s/ Thanh Vong Hoai

Subscribed and sworn to before me this 2nd day of September, 1987.

/s/ NOTARY PUBLIC